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IN THE

# Supreme Court of the United States

October Term, 1982

Cincinnati City School District
Board of Education, et al.,
Petitioners

v.

Mary Ann Roncker,
on behalf of
Neill Roncker, Individually and
on behalf
of all others similarly situated,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

## MOTION TO APPEAL AS AMICUS CURIAE, AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## MOTION OF THE NATIONAL SCHOOL BOARDS ASSOCIATION TO FILE BRIEF AS AMICUS CURIAE

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The National School Boards Association (NSBA) moves this Court for leave to participate as amicus curiae herein, for the purpose of filing the attached brief in support of the Petition for Certiorari. Counsel for Petitioners has consented to the appearance. A copy of the letter of consent is attached. Counsel for Respondents has refused to consent.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts, governed by locally elected or appointed school boards, receives or is eligible to receive financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq.

At first glance, the decision of the Sixth Circuit Court of Appeals in this case may appear to be merely a dispute between

one local school district and the parents of one handicapped child. It is not. Rather, the decision will have an effect on every school district in this country and NSBA believes that it is important for this Court to have the benefit of the views of the national organization which represents these school districts.

Cases brought under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq., are highly emotional and call upon lower courts to make difficult decisions involving the education of handicapped children. These courts must listen to the pleas of parents to approve particular placements or services while the school districts often find themselves in the uncomfortable but necessary position of arguing against the parents. Understandably, courts become caught up in the emotion of the case and their empathy for the parents of the children may cause them

to hold in the parents' favor regardless of the legal principles involved. For example, the Second Circuit Court of Appeals, in Board of Education of Hendrick Hudson Central School District v. Rowley, 632 F.2d 945 (2d Cir. 1980), even invoked a rule to suppress its decision so that the Court could hold for the parents without setting a precedent.

The Supreme Court's reversal of the decision in Rowley, 102 S.Ct. 3034 (1982), had the result of pulling back lower courts, which if left on their own, would hold in favor of the parents of handicapped children regardless of the law or the educational merits of the decision. The Sixth Circuit case below may well have the effect of carving out an exception to Rowley which lower courts can use in their efforts to hold in favor of parents who want their children placed with non-handicapped children at any cost -- a

terrible educational result.

The membership of NSBA is in the business of making these hard decisions every day and is devoted to the highest standards of educational excellence in assuring a quality education for each handicapped student in the country. In light of these factors, NSBA respectfully urges this Court to allow it to state its views on the Petition for Writ of Certiorari.

Respectfully submitted,

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*Citation is to Education for the Handicapped Law Report, published by CRR Publishing Company, Alexandria, Virginia 22313-1905.

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AMICUS CURIAE BRIEF OF
THE NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF PETITIONERS

## INTEREST OF THE AMICUS

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than

minety-five percent of this nation's public school children.

Each of the 16,000 school districts, governed by locally elected or appointed school boards, receives or is eligible to receive financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq.

REASONS FOR GRANTING WRIT

1. The court below has ignored the precedent set by the United States Supreme Court in Board of Education of Hendrick Hudson Central School District v. Rowley, 102 S.Ct. 3034 (1982).
2. The effect of the decision below is to prohibit all school districts in the sixth circuit from operating or assigning handicapped students to special day schools. This decision also serves as a precedent for all other circuits to rule in the same manner.

3. There are two major principles and requirements in the Education for All Handicapped Children Act:

   (a) The requirement of a "free appropriate public education" and

   (b) The requirement that to the "maximum extent appropriate" handicapped children be educated with children who are not handicapped -- the concept of "mainstreaming."

The U.S. Supreme Court has defined the first, but school districts across the country still await definitive guidance as to the meaning of the second.

1. The Supreme Court Decision in Rowley

The Supreme Court's decision in Rowley is the landmark decision under the Education for All Handicapped Children Act. This decision has had the effect of curbing to some degree the understandable

zeal of lower courts which before Rowley gave parents what they wanted, regardless of the law or the educational decisions of local educators. See, e.g., Lang v. Braintree School Committee, 545 F. Supp. 1221 (D. Mass. 1982) and Dopico v. Goldschmidt, 687 F.2d 644,653 (2d Cir. 1982).

The standard set in Rowley requires lower courts to determine only: 1) whether all procedural requirements of the Act have been met and 2) whether the individualized educational program (IEP) developed through the Act's procedures is resonably calculated to enable the child to receive educational benefits. The sixth circuit in the case at bar found that all procedural requirements of the Act had been met and, apparently, also found that Neill would benefit from the school district's proposed IEP. However, without referring to the question of whether the regular

school setting is "appropriate" for Neill, the court held in favor of the parents.

The sixth circuit has chosen not to be hampered by the Supreme Court's admonitions in Rowley and instead has elevated the concept of "mainstreaming" to an unprecedented level bearing no relationship to the education of handicapped children. The court distinguishes Rowley on the ground that Rowley involves "educational methodology" while the case at bar involves "mainstreaming." This is an astonishing conclusion given the fact that the single most important educational decision to be made by a school district in developing an individualized education program for a handicapped child is the appropriate placement for that child. That placement decision is not made in a vacuum but must be related to the educational needs of the child.

The Supreme Court stated in Rowley that the term "appropriate" could be interpreted as meaning the "setting" of the education. 102 S.Ct. at 3046. The high court also noted that "despite this preference for 'mainstreaming' handicapped children .... Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children .... The Act thus provides for the education of some handicapped children in separate classes or institutional settings."[11] 102 S.Ct. at 3038.

The lower court is correct in finding that the concept of "mainstreaming" or "least restrictive environment" is indeed an important cornerstone of the Education for All Handicapped Children Act. However, in the statute and its regulations, references to the concept of "mainstreaming" are always modified by the words "to the maximum extent appropriate"

or other references to the "unique needs" of the child. The purpose of these requirements, of course, is to assure that the state and local educational agencies treat each handicapped child as an individual.

Further, the references to the interplay between handicapped and nonhandicapped children are always found in the context of educational services, not in reference to other activities such as recess and lunch.

The debate between Neill Roncker's parents and the school district is similar to that in Rowley. The parents in Rowley were strongly in favor of the use of an interpreter for their child, even though the evidence showed that Amy was not doing as well with an interpreter as she had done previously. Similarily, the parents of Neill Roncker believe that the avoidance of the "stigma" of a special school

overshadows the fact that Neill is not doing well in the regular school. Roncker v. Walter, (6th Cir. 1983) No. 81-3494 slip op. at 11. In both cases the school districts developed the IEP with the individual needs of the child in mind, then developed programs designed to meet those needs. The district court in the instant case "recognizing that placement with non-handicapped children should be a most important objective," still found that Neill could not be appropriately educated in the regular school. Id.

The sixth circuit simply ignores the clear directive of the Supreme Court not to substitute the court's judgement for the educational judgement of the local school district, and further, ignores the "appropriate" education requirement of the Act itself.

2. Effect of the Decision on School Districts Across the Country

A study by the Rand Corporation for the U.S. Department of Education found that of those handicapped students served in public schools, one percent were in regular education classes full time and received indirect services only, 41 percent were in regular education classes and received special related services only, two percent were in regular education class and received itinerant special teaching services, 31 percent were in a regular class a majority of the time and in a special class a minority of the time, 11 percent were in a special class a majority of the time, five percent were in a special class full time, five percent were in a special day school for only handicapped pupils and three percent were homebound. "The Cost of Special Education," November, 1981. The statistics used for the study

were from the 1977-1978 school year.

The U.S. Department of Education's Fourth Annual Report to Congress on the Implementation of P.L. 94-142, which is based on 1979-80 and 1980-81 data, states that less than seven percent of handicapped children are receiving their education outside of regular education buildings. "The number of children identified as handicapped and receiving special education and related services has continued to rise since the passage of P.L. 94-142 .... For the most part, handicapped children are being served in regular education buildings with their non-handicapped peers."

Members of Congress, during debate on the Act, expressed great concern over the fact that four million children at that time were not receiving educational services at all but were either shunted into institutions or were simply not allowed to enroll in the public schools at

all. June 18, 1975 Cong. Rec. S 10959.

As the above statistics show, that situation has changed. Students are today placed in special settings, not to "get rid" of them but in order to provide them with an "appropriate" education. If the decision below is left to stand, it could have a devastating effect on the 5% of children who are most in need of the special services which the Act was passed to provide.

The court below, ignoring the educational decisions made by the school district, takes the "mainstreaming" concept completely out of the context of education and places it in a separate context, requiring the school district to place all handicapped children in the regular school if it is "feasible" to do so. If the school district is forced to ignore the educational appropriateness of the placement there will be only rare instances

where regular school placement is not "feasible." These would be cases of severely physically handicapped children who are hospitalized and cannot be educated in the regular school. All children who are presently educated in special day schools would have to be placed in the regular school.

3. School districts across the country need definitive guidance on the relationship of "mainstreaming" and "free appropriate public education."

On August 4, 1982 the Department of Education published for comment a proposed regulation, 47 Fed. Reg. 33836, under the Education for All Handicapped Children Act. NSBA surveyed its members on the proposal in an effort to get the most data possible on issues of the Act's implementation and interpretation. Representatives from across the country

consulted with NSBA on these issues. The consensus was that there are four areas particularly concerning school districts:

1. How does the concept of "least restrictive environment" or "mainstreaming" relate to the concept of "free appropriate public education"?
2. What is a "related service"?
3. May handicapped students be subjected to discipline?
4. The fourth concern is a mechanical problem relating to the paperwork requirements of the Individual Education Plan.

School districts continue to raise questions as to whether the "mainstreaming" concept stands on its own or relates to "appropriate" placement.

There are several court decisions relating to the placement of handicapped

children for educational purposes. See, e.g., Springdale School District #50 of Washington County v. Grace, 656 F.2d 300 (8th Cir. 1981); Town of Burlington v. Dept. of Ed. of Commonwealth of Mass., 655 F.2d 428 (1st Cir. 1981). Some of these decisions arise out of suits by parents who wish more restrictive placements for their children. See, e.g., Hessler v. State Bd. of Ed. of Maryland, ___ F. Supp. ___ (D. Md. 1981) 3 EHLR 553:262.* None have been found to exist relating to placement for noneducational purposes, such as recess and lunch. All of the state agency decisions which have been found on this point, however, agree that placement decisions should be based on the appropriateness of the educational criteria and not on some concept of "mainstreaming"

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*Citation is to Education for the Handicapped Law Report, published by CRR Publishing Company, Alexandria, Virginia 22313 - 1905

which bears no relationship to the appropriate placement for the purpose of meeting the unique educational needs of the child. The decision at bar, if left standing, would reverse the state educational agency decisions in Pennsylvania (3 EHLR 503:157); Illinois (3 EHLR 503:339); Indiana (3 EHLR 503:309); and California (4 EHLR 504:103).

## CONCLUSION

NSBA, on behalf of its membership, urges this Court to grant the writ of certiorari in this case. Unfortunately, in its zeal to render a decision favorable to the parents of one severely handicapped child, the Sixth Circuit has ignored the effect which its decision will have on all other handicapped children whose parents want them enrolled in special day schools.

In setting its unique precedent, the lower Court has also ignored the Supreme Court's directive to lower courts to leave educational decisions to those best qualified to make them.

Respectfully submitted,

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